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IN THE

Supreme Court of The United States

OCTOBER TERM, 1965

No. 801

ATOMIC OIL COMPANY OF OKLAHOMA, INC.
Petitioner,

vs.

BARDAHL OIL COMPANY; BARDAHL MANUFACTURING CORPORATION; BARDAHL INTERNATIONAL CORPORATION; and DALE McKEOWN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner above named prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on August 25, 1965. Petition for a rehearing was denied September 21, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Northern District, unreported, appears in the Record, pages 82-87 incl. Nine copies of the record are filed with this Petition.

The opinion of the United States Court of Appeals for the Tenth Circuit, printed in Appendix 1(b) hereto, infra, page 29, is unreported.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on August 25, 1965. Petition for rehearing was denied September 21, 1965. The jurisdiction of this Court is invoked under 28 USC, section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals for the Tenth Circuit and the District Court for the Northern District of Oklahoma err in overruling the statutory presumption of validity attached to a trademark registered on the principal register of the patent office when there was no rebutting evidence presented by the defendants to overcome the presumption of validity normally attached to such registration under 15 USC Sec. 1057(b)?

2. Did the Court of Appeals for the Tenth Circuit err in holding that in order to establish a secondary meaning purchasers must have knowledge on their part as to who actually is the maker or producer of the product?

STATUTES INVOLVED

The following statutes are deemed applicable to this case:

15 USCA § 1052(f):

> "(f) Except as expressly excluded in paragraphs (a)-(d) of this section, nothing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce. The Commissioner may accept as prima facie evidence that the mark has become distinctive, as applied to the applicant's goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years next preceding the

date of the filing of the application for its registration. July 5, 1946, c. 540, Title I, § 2, 60 Stat. 428; Oct. 9, 1962, Pub.L. 87-772, § 2, 76 Stat. 769."

15 USCA § 1072:

"*Registration as constructive notice of claim of ownership*
"Registration of a mark on the principal register provided by this chapter or under the Act of March 3, 1881, or the Act of February 20, 1950, shall be constructive notice of the registrant's claim of ownership thereof. July 5, 1964, c. 540, Title I, § 2, 60 Stat. 435."

15 USCA § 1114 (1) (a) (b):

"*Remedies; infringement; innocent infringement by printers and publishers*

"(1) Any person who shall, without the consent of the registrant —

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, or

(b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use

is likely to cause confusion, or to cause mistake, or to deceive."

15 USCA § 1115 (a):

"Same; registration on principal register as evidence of exclusive right to use mark; defenses

"(a) Any registration issued under the Act of March 3, 1881, or the Act of February 20, 7905, or of a mark registered on the principal register provided by this chapter and owned by a party to an action shall be admissible in evidence and shall be prima facie evidence of registrant's exclusive right to use the registered mark in commerce on the goods or services specified in the registration subject to any conditions or limitations stated therein, but shall not preclude an opposing party from proving any legal or equitable defense or defect which might have been asserted if such mark had not be registered."

15 USCA § 1116:

"Same; injunctions; enforcement; notice to Commissioner

"The several courts vested with jurisdiction of civil actions arising under this chapter shall have power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent the violation of any right of the registrant of a mark registered in the Patent Office. Any such injunction may include a provision directing the defendant to file with the court and serve on the plaintiff within thirty days after the service on the defendant of such injunction, or such extended period as the court may direct, a report in writing under oath setting forth in detail the manner and form in which the defendant granted upon hearing, after notice to the defendant, by any district court of the United States

may be served on the parties against whom such injunction is granted anywhere in the United States where they may be found, and shall be operative and may be enforced by proceedings to punish for contempt, or otherwise, by the court by which such injunction was granted, or by any other United States district court in whose jurisdiction the defendant may be found.

"The said courts shall have jurisdiction to enforce said injunction, as provided in this chapter, as fully as if the injunction had been granted by the district court in which it is sought to be enforced. The clerk of the court or judge granting the injunction shall, when required to do so by the court before which application to enforce said injunction is made, transfer without delay to said court a certified copy of all papers on file in his office upon which said injunction was granted.

"It shall be the duty of the clerks of such courts within one month after the filing of any action, suit, or proceeding arising under the provisions of this chapter to give notice thereof in writing to the Commissioner setting forth in order so far as known he names and addresses of the litigants and the designating number or numbers of the registration or registrations upon which the action, suit, or proceeding has been brought, and in the event any other registration be subsequently included in the action, suit, or proceeding by amendment, answer, or other pleading, the clerk shall give like notice thereof to the Commissioner, and within one month after the decision is rendered, appeal taken or a decree issued the clerk of the court shall give notice thereof to the Commissioner, and it shall be the duty of the Commissioner on receipt of such notice forthwith to endorse the same upon the file wrapper of the said registration or registrations and to incorporate the

same as a part of the contents of said file wrapper. July 5, 1946, c. 540, Title VI, § 34, 60 Stat. 439."

15 USCA § 1117:

"Same; recovery for violation of rights; profits damages and costs

"When a violation of any right of the registrant of a mark registered in the Patent Office shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of section 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. July 5, 1946, c. 540, Title VI, § 35, 60 Stat. 439; Oct. 9, 1962, Pub.L. 87-772, § 19, 76 Stat. 774."

15 USCA § 1120:

"Same; civil liability for false or fraudulent registration

"Any person who shall procure registration in the Patent Office of a mark by a false or fraudulent declaration or representation, oral or in writing, or by any false means, shall be liable in a civil action by any person injured thereby for any damages sustained in consequence thereof. July 5, 1946, c. 540, Title VI, § 38, 60 Stat. 440."

15 USCA § 1121:

"*Same; jurisdiction of Federal courts*
"The district and territorial courts of the United States shall have original jurisdiction and the courts of appeal of the United States shall have appellate jurisdiction, of all actions arising under this chapter, without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties. July 5, 1946, c. 541, Title VI, § 39, 60 Stat. 440; June 25, 1948, c. 646, §§ 1, 32(a), 62 Stat. 870, 991; May 24, 1949, c. 139, § 127, 63 Stat. 107."

STATEMENT OF CASE

This is an action with Federal Jurisdiction based upon the Lanham Act wherein the Plaintiff, Petitioner herein, sought a temporary injunction and permanent injunction against the Defendants for trade-mark infringement and unfair competition, in addition to damages. The Petitioner is the owner of the trademark "Savmotor" in its distinctive design which was first registered on the Principal Register January 12, 1960. A bomb burst design was added and this new mark was again registered March 15, 1960, on the Principal Register. The trademark and product was advertised extensively such that sales grew from $82,489.96 in 1959 to $588,823.02 in April of 1964. The Petitioner spent approximately $597,067.68 in the advertising of his mark and had a sales territory of approxi-

mately 31 states. In 1962 the Bardahl complex of companies began selling a chemically identical product under the name "Savoil." In May 1963 Petitioner's attorney wrote to Bardahl protesting the use of the mark, giving notice of infringement, and requesting Bardahl to cease this activity.

During the time of correspondence Bardahl had failed to register its mark on the Principal Register but effected registration on the Supplemental Register.

Suit was field by Petitioner in the District Court and a Preliminary Injunction was granted Petitioner which Bardahl violated and was punished by the Court for contempt. At trial the Court found that there is not only a likelihood of confusion between the marks as a result of their similarity, but the evidence clearly demonstrated instances of actual confusion. In fact a survey revealed that 69% of those interviewed thought the two marks *came from the same source*. The court found Petitioner's mark to be descriptive but found it had acquired a secondary meaning, and since there was only submitted evidence of said secondary meaning in Missouri, Texas, and Oklahoma, awarded an injunction against the use of the mark Savoil in those states and refused to award damages. The lower court concluded as a matter of law that Petitioner's mark may acquire a secondary meaning even though the product is more emphasized that the producer, citing Coca-Cola Company v. Koke Company, 254 U. S. 143, 146, Saalfield Publishing Company v. G. & C., 238 Fed 1.

Both parties appealed, and after oral argument the Court of Appeals held:

1. That Petitioner's mark is descriptive and not entitled to be registered under the Lanham Act.

2. That secondary meaning has at its primary significance

in the minds of the consumer public, *not* the product but the producer or source.

3. That Petitioner's mark *had not* acquired a secondary meaning such that in the minds of the public there was no identification between the mark and its source thus reversing the District Court and ignoring the sound reasoning in the Coca-Cola Company v. Koke Company, supra, as held by this honorable court.

4. That the survey used in the trial court was of no value because it gained information only about the product rather than its source. In this connection we point out that the court erroneously interpreted the survey photograph by concluding that the words on Petitioner's can "Product of Atomic Oil Company of Oklahoma" had been marked out and did not appear. This is clearly an error.

5. The court reversed the trial court and remanded with instructions to enter judgment for Bardahl.

REASONS FOR GRANTING WRIT

The matter is of national significance insofar as it pertains to the interpretation of the Lanham Trademark Act of 1946. With the increase of trademark registrations, some 21,030 in 1964, extraordinary emphasis is necessary for protection against product simulation and related unfair competitive practices in order to fortify a mark in its commercial competitive position.

1. Of special significance in this regard are the actions of the trial court and the Court of Appeals wherein the statutory presumption of validity of Petitioner's mark was overruled without any evidence, factual or otherwise, whatsoever, to rebut this statutory presumption. There has been a disturbing num-

ber of court decisions during the last twelve months which have ignored the prima facie presumption of validity with regard to registration on the Principal Register. The strength, weakness, and effect of this presumption should now be made clear for the national interest. What use is it for one to pride himself upon the protection of the Principal Register only to have a court strike down a mark's validity in absence of evidence to the contrary?

2. The Court applied its own standards as rebuttal to the prima facie validity of a registered trademark where there was no rebutting evidence that purchasers considered the mark descriptive. The Patent Office considered the same registration of plaintiff, one of which included the Atomic Bomb burst design therewith, and in each instance permitted registration upon the Principal Register without ever once objecting to the application as not registerable as such for being descriptive; and the two registrations were granted. The trial court held:

> "The word Savmotor is a combination of the word 'save' and the word 'motor', the word 'save', being misspelled. The term is descriptive and cannot be appropriated from general use and become the exclusive property of anyone."

The Tenth Circuit, ignoring the absence of any rebutting evidence affirmed the decision of the trial court and stated:

> "It seems perfectly clear *to us* that the word 'Savmotor' is descriptive of the qualities and the functions of the products and was not entitled to registration under the Lanham Act." (Emphasis added)

Petitioner's understanding of evidence, historically in the law, has been that the rebuttal of prima facie evidence has required factual evidence to be submitted by the party contesting the

validity. In othr words, the presumption of validity set forth and granted by the Lanham Act of 1946, being a rebuttable one without question, requires evidentury facts to be presented by the defendant to show that in the minds of the purchasing public, not the mind of the judge, the mark is descriptive of the goods.

The District Court and the Tenth Circuit Court of Appeals has seen fit to set aside the action of one of the executive departments of the government. The leading case of *Aluminum Fabricating Co. of Pittsburg* v. *Season-All Window Corp.*, 259 F.2d 314 (Second CA 1958) has clearly established the burden of proof in overturning the presumption of validity and also outlines correctly the duty of the Court in determining such a question. We freely quote from this decision and feel that the Supreme Court of the United States should take this opportunity to establish this matter as uniform law to be applied equally to the circuits without question. We quote as follows:

> "In the Lanham Act Congress made it clear that weight should be accorded to the actions of the Patent Office. The Act provided that 'A certificate of registration of a mark • • • shall be prima facie evidence of the validity of the registration • • •.' 15 U.S.C.A. § 1057 (b). We are of the opinion that this means not only that the burden of going forward is upon the contestant of the registration but that there is a strong presumption of validity so that the party claiming invalidity has the burden of proof and in order to prevail it must put something more into the scales than the registrant. In a case such as this, where it can be argued with equal force that a mark is descriptive and on the contrary that it is arbitrary and fanciful, the courts should not overrule the action of the Patent Office to whose care Congress has entrusted the preliminary de-

termination as to whether a mark fulfills the requirements of the statute.

"One of the purposes of the Lanham Act is to encourage registration of trademarks and other marks. Thus, among other things, that Act goes beyond all prior legislation in this field by providing, for the first time, that registration is prima facie evidence of validity.

• • •

"The law reports are full of cases which counsel can cite on both sides of the question of whether a trademark is descriptive within the meaning of the Act. See cases cited in 87 C.J.S. Trade-Marks, Etc. § 33, pp. 267-272, and particularly Gold Seal Company v. Weeks, D.C. 1955, 129 F. Supp. 928,929,934, affirmed sub nom. S. C., Johnson & Sons Inc., v. Gold Seal Co., 1956, 97 U.S.App.D.C. 282, 230, F.2d 832. It may well be that the many differing and irreconcilable views of the courts was one of the reasons which impelled Congress to write into the 1946 Act the presumption of validity from registration. At any rate nothing could be clearer than the fact that prior decisions were of little help, and that there was a need to give to the imprimatur of the Patent Office some real value.

"Here the plaintiff's trademark was registered by the Patent Office on its Principal Register, the registration being Prima Facie evidence of its validity, and the registration was upheld by the district court. We give full weight to the registration and hold that this prima facie evidence of validity has not been overcome by the arguments advanced by the appellant."

But despite the weight the courts should lend to the wisdom of the Patent Office in allowing registrations upon the Principal

Register, yet the Tenth Circuit "as a matter of law" can find a mark descriptive and strike down in an instant the basis of a company's business, goodwill, and livelihood. We quote from National Nu Grape Co. v. Guest, supra, as follows:

> "The trial court concluded, *as a matter of law,* that the term Mr. Grape was not a valid trademark because it was descriptive of the product . . ."

Without going further in this proposition we now state for the Court's consideration the conversation over the telephone between a patent attorney and his client regarding such a problem as we have here at bar, and we do this in the socratic doctor-student form as succinct illustration of the chronic problem that presents itself to the practitioner in the light of this recent Tenth Circuit decision:

Telephone: Ring:

Counsel: Hello.

Client: Hello, counselor. Say, I got my registration back on my trademark stating we were registered on the Principal Register of the U. S. Patent Office.

Counsel: Well, I guess you're in business and start advertising and selling your product.

Client: It took long enough to get it registered and cost quite a bit considering all the trouble we went to conceiving a mark that would identify our goods from others, the artistic work, and your fees.
But what I want to know is how safe are we from infringement? Is this half million dollars I am about to spend a safe investment, or could it go

down the drain if someone comes out with a similar mark that confuses my customers?

Counsel: There is a statute which says your mark is presumed to be prima facie valid.

Client: What does that mean?

Counsel: I don't know.

Client: What do you mean you don't know? I didn't pay you $25.00 an hour to process that mark and afford my mark protection from infringement and then tell me you don't know what that statute means.

Counsel: You laymen are all alike. You never try to comprehend the beauty and clarity and precedence of such grand judicial concepts as justice, equity and reason. Every time we try to introduce you to these self-evident truths, you go away grumbling something about "legalistic gobbledy gook." But since you want me to do your thinking for you, I will tell you what. Go ahead and advertise your trademark. If afterwards some newcomer in the field copies your trademark and horns in on your good will and advertising and confuses your customers with his trademark, and after you sue in the District Court to protect your mark and seek justice, and that Court finds your mark invalid as descriptive, then you will be enlightened as to the nature of justice, equity, and reason as applied to your proposed advertisement.

Client: You sure have been a great help, Counsel.

Counsel: Well, that is what lawyers are for, to make avail-

able to the public the benefits of their special training by interpreting our involved modern law in simple terms that the ordinary man can comprehend and letting him know in specific cases just where he stands regarding his rights.

Client: You mean all this after I have already spent half a million dollars in advertising and developing my mark?

Counsel: Yes.

Counsel: And when you sue them, the Court, without any evidence at all, can declare your mark descriptive and kick you in the teeth. This has been the trend, and that is why I can't tell you what that statute means.

Client: What if people know that that mark identifies my product.

Counsel: You then have to prove that, and the Courts call that secondary meaning.

Client: Yeah, but some people know only that Savmotor is my product, as distinguished from others, but they don't know Atomic Oil Company makes it any more than you know Energine is made by the Cummer Company.

Counsel: Well, that depends where you sue. Some courts say you can have secondary meaning with an anonymous source, but others say the customer must know who the source is. I can't give you a definite answer.

Client: Well, what if a survey shows 69% of the customers confuse my product with Brand X?

Counsel: It again depends on where you sue, because some courts say it is enough to be confused as to the goods, and other courts say you have to be confused as to the source.

Client: Then if I picked the wrong Circuit, then if we fail on this secondary meaning, then I am out of luck even though some pirate is trading on my good good will.

Counsel: That seems to be the sad state of the law.

Client: What about unfair competition?

Counsel: Unless you have a trademark, the courts won't help you.

Client: What's the use of applying for a trademark?

Counsel: That's what I've begun to wonder.

Client: Thanks a lot.

Telephone: Click.

2. The fundamental gross error of the Tenth Circuit was its finding that under the doctrine of secondary meaning the primary significance of a mark in the mind of the customer is *not* the product but the producer. This is contrary to the conclusion of law of the trial court wherein that court held that a product may acquire a secondary meaning even though the product is more emphasized than the producer. The trial court

cited in support of this conclusion *Coca-Cola Company* v. *Koke Company*, 254, U. S. 143, 65 L Ed 189 189 (1920). This Court in that case held:

> ". . . we see no reason to doubt that, as we have said, it has acquired a secondary meaning in which, perhaps, the product is more emphasized than the producer, but to which the producer is entitled . . . "

Now the Tenth Circuit has in esse refused to apply this sound reasoning. In so doing they have rendered a decision in this matter which is so far departed from the accepted and usual course of judicial proceeding such as to call for the exercise of this Court's power of supervision. Not only has the court departed from its own established precedents, but it also considered the wrong evidence in arriving at its decision. Note in particular, the Court committed error when it made the assumption that the testimony of Dr. Day in the market survey was for the basis of proving secondary meaning, in the first instance. That testimony was established to show likelihood of confusion only. It appears that the Court quite noticeably overlooked the secondary meaning testimony which was conveniently appended to appellee's brief in appeal No. 78881 and appended thereto for the convenience of the Court. Note in particular that the decision is also expressly contrary to the previous decision of the Tenth Circuit Court and Judge Phillips in *National NuGrape Co.* v. *Guest*, 164 F.2d 874 (10th Cir. 1947). In that case on page 877, the standard for secondary meaning of a trademark for the court was set forth:

> "The crux of a secondary meaning is the origin of the goods from a single source. As stated by Judge L. Hand, in Bayer Co. v. United Drug Co., D.S. 272 F. 505, 509, the public must understand by the term 'That it came from

> the same, single, though, * * * anonymous, source from which they had got it before.'"

Note the inconsistency of the court how it noticeably refrained from citing any of its own decisions and relied to a great extent upon ex parte decisions made through the Patent Office tribunals. Attention is given to two noticeable errors in interpreting and reviewing the evidence by the Court of Appeals. Note the description of the photograph utilized by Dr. Day in his survey, where the court stated:

> ". . . the words, 'Atomic Oil Company of Oklahoma,' were masked out and did not appear, and in the photograph of "Savoil" the words "Bardahl Oil Company" were wholly omitted."

Although the court was in error in anything being masked out or wholly omitted, the point is significant to the fact that this testimony was not for the purpose of establishing a secondary meaning. More importantly there appears to be a need for interpretation by this court as to whether or not in the establishment of a secondary meaning the purchasing public must actually identify or know who the producer is. It should become apparent that there is a need for an interpretation of what is meant in the law of secondary meaning that purchasers are proved to buy something because of its source. What is meant by the word source? Must they know and identify the actual producer? It should be cognizant that in the modern day business transaction when considering modern trade methods and distribution of goods from all over the country, from the manufacturer to the jobber or importer or retailer to the customer that the source of origin of the goods bearing even well known trademarks is seldom known to the customer. The Tenth Circuit's ruling, as well as other cases in line, should certainly be termed archaic by this Court, which in its tradition

aligns the inferior courts with modern trend and sound reasoning.

It was observed in *Family Circle Inc.* v. *Family Circle Associates, Inc.*, 332 F.2d 534 (Third C.A. 1964) as follows:

> "Accordingly in the sixteenth century, a trademark was indicative either of the origin or ownership of the goods to which it was affixed, and today the problem posed is to what extent does that trademark function as to either? As a matter of fact, as has been pointed out by the very courts that define trademarks in terms of ownership or origin, that owing to the ramifications of modern trade and international distribution of goods from the manufacturer to the jobber or importer and retailer to the consumer, the source or origin of the goods bearing a well-known trademark is seldom known to the consumer."

The Tenth Circuit cited a second circuit case, *Blisscraft of Hollywood* v. *United Plastics Co.*, 294 F.2d 694, 697, as authority for its holding that "the design is a mark of distinction identifying the source of the article and that purchasers are moved to buy it because of its source." This is absurd under the realities of the market place.

The trial court made a finding of fact as to confusion and as to secondary meaning. The Tenth Circuit overturned these findings of fact without finding the trial court was in clear error, and this is certainly contrary to the established principle of the Tenth Circuit, as set forth in the case of *Drexel Enterprises, Inc.* v. *Richardson*, 312 F.2d 525 (Tenth C.A. 1962) wherein Judge Breitenstein stated:

> "The Tenth Circuit is committed to the principle that the issue of confusing similarity in trade-mark and trade name

cases presents a question of fact and that the findings of the trier of the facts in regard thereto are binding on appeal unless clearly erroneous."

We ask the court to take the "test" that is contained in Appendix 2 hereto which comprises a list of popular trademarks to be coupled and matched with their source. The correct answers are contained in Appendix 3 for "grading." We believe the court will learn from this test the absurdity of the Tenth Circuit's holding and apply reality to the law of secondary meaning. We believe that the law is correctly stated in Nimms, the *Law of Unfair Competition and Trademark*, 4th Ed., 1947, pp. 169-170, stated as follows:

> "Secondary meaning may exist between a name and a manufacturer or seller whose identity is not known to the buyer. Many articles are asked for by brand name. The buyer seeks the product of some one particular concern. He does not know its name, or its location, or whether it is a corporation or an individual. He knows only he seeks a particular thing known by name familiar to him. There are many articles on the market that have been sold for years, for which buyers have a decided preference, yet probably not one in a hundred of such persons could tell the maker. Nevertheless this buyer's preference for the goods of this unknown concern is a species of industrial property having a very decided market value and it may rest upon secondary meaning. This idea was expressed by the Supreme Court when it said of Coca-Cola that it means 'a single thing coming from a single source and well known to the community.'" Coca-Cola Co. v. Koke Co. 254 US 143, 146 (1920), 65 L.Ed 189, 41 SC 113.

Four hundred years ago a trademark indicated either the origin or ownership of the goods to which it was affixed. It

has been repeatedly pointed out in terms of ownership or origin that, owing to the ramifications of modern trade and the national and international distribution of goods from the manufacturer through the jobber or importer and the retailer to the consumer, the source of origin of the goods is seldom known to the consumer.

Petitioner displayed with clarity the confusion between these marks when it conducted a public survey in which 69% of those involved thought the marks "Savmotor" and "Savoil" emanated from the same source. Can this be ignored by this Court? To deny this Petition is to deny Petitioner justice.

THE MERITS OF THE CASE

This appeal for justice on the merits of the case revolves on two questions which are confused by the circuits,

(a) Upon what basis may the court strike down the presumed validity of a registered trademark – evidentuary or opinion of each individual justice?

(b) Secondary meaning. Is the ruling of *Coca-Cola Co.* v. *Koke Co.*, supra, to stand? The test of secondary meaning is confusion between the products rather than the confusion between known sources.

CONCLUSION

For the reasons herinabove stated, it is respectfully submitted that this Petition should be granted.

FARMER, WOOLSEY, FLIPPO & BAILEY
By *Lawrence A. G. Johnson.*
HEAD & JOHNSON
By *James R. Head*

Of Counsel:
ROBERT J. WOOLSEY

APPENDIX I (a)

Bardahl Oil Co. et al. vs. Atomic Oil Co. of Okla., Inc. et al.
198] Order Of Permanent Injunction

Now on this 19th day of May, 1964, this matter came before this Court for decision and judgment, the Court having taken this this matter under advisement, after having received and heard all of the evidence and arguments of counsel, together with all briefs submitted by the parties at trial heretofore had. The Plaintiff appeared by and through its attorneys, Farmer, Woolsey, Flippo & Bailey, by Lawrence Johnson and Head & Johnson, by James R. Head. The Defendants were present and represented by their attorney, Floyd L. Rheam. All parties being present in open Court, the following findings and orders were pronounced by the Court:

Findings Of Fact

1. The Court finds that it has jurisdiction of the subject matter and of all parties herein. The Court finds that this was an action for trademark infringement and unfair competition wherein the Plaintiff, Atomic Oil Co. of Oklahoma, Inc., a corporation organized under the laws of the State of Oklahoma, and citizen of Oklahoma, brought this action against the Defendants, Bardahl Oil Company, a Missouri Corporation, and citizen of that state, Bardahl Manufacturing Corporation, a Washington Corporation, and citizen of that state, and Dale McKeown, an individual citizen of the State of Oklahoma, d/b/a Bardalh East Oklahoma.

199] 2. That the Plaintiff is a relatively small company which deals chiefly in motor oil additives. It commenced marketing such products in May 1957 and started using the trademark with the "Bomb Burst" design May 27, 1957. And it first used the name Savmotor in interstate commerce on June 25, 1958.

They expanded into fourteen states besides Oklahoma in 1958, and to four additional states in 1959, and seven more states in 1960, and two additional states in 1959, and seven more states in 1960, and two additional states in 1961 and 1962. From all the testimony it appears that sales grew from approximately $82,489.96 in 1958 through 1959 in the following manner: 1959 to 1960 the sales were approximately $195,593.02; in 1960 to 1961 approximately in the sum of $423,225.14; in 1961 to 1962 approximately $463,994.68; and from 1962 through April 2, 1964, gross sales were $588,823.02.

3. The Court further finds that the family of the Bardahl Companies is a world-wide group of corporations selling many types of products for use in automobiles. Most of its products are sold under the name of Bardahl, but the testimony shows that in October 1962, the company decided it should add a motor additive to its line. The Court finds that the name Savoil was selected for its new product, which name was first used in sales in Canada. There is a conflict in testimony as to the date of first use in Canada, one witness testifying as to the date of November 1961, and another witness testifying some date after February 1962. The Court finds, and it was stipulated by and between the parties, that Bardahl started marketing the product, Savoil, in the thirteen western states in October 1962. It is further stipulated by and between the parties and as so found by the Court that the Bardahl Oil Company of St. Louis started distributing the product in May 1963 in the St. Louis area.

4. The Savmotor trademark was registered on the Principal Register on January 12, 1960. On March 15, 1960, Plaintiff was granted registration of the trademark Savmotor and a Bomb Burst Design for use with its motor oil additives.

5. The Defendants' trademark Savoil was registered on the Supplemental Register on July 30, 1963.

200] 6. The Plaintiff has spent approximately $597,067.68 in advertising and promoting the sale of Savmotor. It has employed as many as fifteen salesmen who traveled about the country promoting the sale of its product.

7. The Plaintiff's product had an established reputation at the time Defendant commenced selling its product under the name Savoil in the St. Louis area. The nickname "Sav" has become identified with the product of the Plaintiff and the consuming public calls for it by that name. Witnesses testified when they first saw the Savoil cans on display that they thought the producer of Savmotor had come out with a new product. The evidence shows that such reputation has been established in the States of Oklahoma, Missouri and Texas.

8. In May 1963, the Plaintiff's attorney wrote to Defendt protesting against Defendant's use of the mark Savoil and claiming it infringed its trademark. Plaintiff continued by correspondence to challenge such use and requested that Defendant advise its opinions to the alleged infringement. Defendant promised to so advise Plaintiff, but did not do so, and continued the sale of its product under the name Savoil. The Defendants had no knowledge of the product Savmotor at the time they commenced using the name Savoil.

9. The products themselves are competitive, the basic materials and functions are the same. A Bardahl chemist so testified. They are sold in the same channels of trade and used for practically the same purposes, which adds to the likelihood of confusion.

10. There not only is a likelihood of confusion as a result of the similarity of names, but the evidence clearly demon-

strates that there have been many instances of actual confusion.

11. There was evidence submitted by Plaintiff including a poll taken by a marketing expert, which showed that some members of the public, a small percentage of whom were consumers of this type of product, found the cans and symbols thereon are confusingly alike. However, the cans of the two competing products are a different size and color, and the containers used for all motor additives are somewhat similar in appearance, at least all those exhibited in court. The evidence is, therefore, insufficient to establish the fact that the consuming public generally is likely to be confused by any similarity in the appearance of the container or the symbols thereon. 201] 12. Plaintiff has used the name Savoil on pocket protectors given away for advertising purposes, but has never used such name on its product.

13. No actual fraud or atempt to deceive or palm-off Defendants' products as Plaintiff's has been shown.

14. Defendants heretofore have been found guilty of contempt in violating the preliminary injunction heretofore issued by this Court and a judgment was heretofore awarded the Plaintiff in the sum of $1,485.00.

Conclusion Of Law

1. The Court has jurisdiction of the subject matter and of the parties hereto.

2. The word Savmotor is a combination of the word "save and "motor," the word "save" being misspelled. The term is descriptive and cannot be appropriated from general use

and become the exclusive property of anyone. 15 USCA 1052(e).

Therefore, Savmotor, although registered and entitled to a presumption of validity, is not a valid technical trademark. National NU Grape Company v. Guest, 69 F. Supp. 863, affirmed by the Tenth Circuit, 164 F.2d 874.

3. Because of the length of time Plaintiff has used the trademark Savmotor it had an established reputation at the time Defendant began selling its product in this area. By the extent and cost of Plaintiff's advertising and promotion, the name Savmotor has become associated in the mind of the consuming public with Plaintiff's product, and has acquired a secondary meaning entitled to protection from infringement.

4. It is not necessary to constitute infringement that consumer know the identity of the maker of a product if they recognize that the product comes from a single, though anonymous source. National Nu Grape Company v. Guest, 164 F.2d 874; Bayer Company v. United Drug Company, 272 Fed. 505, 509.

202] It may acquire such secondary meaning even though the product is more emphasized than the producer. Coca-Cola Company v. Koke Company, 254 U.S. 143, 146; Saalfield Publishing Company v. G. & C., 238 Fed. 1.

5. The Plaintiff is entitled to protection of its common-law trademark only in the areas where it has shown its name has acquired a secondary meaning before Defendants' entrance into the area, which, in this instance, is in the States of Missouri, Texas and Oklahoma. Beneficial Loan Corporation v. Personal Loan and Finance Corporation, 100 F. Supp. 838; Federal Glass Company v. Loshin, 126 F. Supp. 740; Griesen-

dieck Western Brewery Company v. People Brewing Company, 149 F.2d 1019, 1022.

6. The Plaintiff has no priority of use of the same Savoil since it has never used that term on its product. Nims, Unfair Competition and Trademarks, Vol. 1, p. 636; Persha v. Armour, 239 F.2d 628.

7. Where a person has only a common-law trademark, fraud cannot be presumed, and the owner must show wrongful or fraudulent intent. National Nu Grape Company v. Guest, 69 F. Supp. 863, affirmed by the Tenth Circuit 164 F.2d 874.

No presumption of fraud can be drawn from the fact that the Defendants continued to use the name Savoil after notice. Straus v Sorenson, 224 F.2d 61. If the Defendants in good faith believed they were not infringing Plaintiff's trademark, their continued use of the accused mark would not, in itself, make them guilty of "deliberate and willful" infringement. Wembley, Inc. v. Diplomat Tie Company, 217 F. Supp. 565, 581; Square D. Company v. Sorenson, supra.

8. Because of the similarity in names, the fact that the products are highly competitive, and the actual confusion that has been shown, the use of the name "Savoil" as a name for Defendants' oil additive constitutes unfair competition and infringes the Plaintiff's common-law trademark, Savmotor.

9. Therefore, a permanent injunction will be granted enjoining Defendant from the use of the name Savoil on its product in the States of Oklahoma, Texas and Missouri. The right to an injunction is not made to depend upon the fact that fraud or deception was practiced. Mishawaka Rubber and Woolen Manufacturing Company v. Kresge Company, 119 F.2d 316.

10. In the absence of a showing of fraud and an intent to palm-off, an injunction will satisfy the equities of this case, and an accounting of profits earned by the Defendant or damages sustained by the Plaintiff is denied. Champion Spark Plug Company v. Sanders, 331 U.S. 125; Square D. Company v. Sorenson, supra. However, the Plaintiff shall recover the sum of $1,485.00, which heretofore has been decreed to be due it as damages and costs by reason of the violation by Defendants of the preliminary injunction.

11. Costs are taxed against the Defendants, but since there has been no showing of fraudulent or malicious conduct of the infringer, Plaintiff's claim for attorney's fees will be denied. A. Smith Bowman Distillery, Inc. v. Schenley Distillers, Inc., 204 F. Supp. 374.

It Is Therefore Ordered, Adjudged And Decreed that the Defendants, and each of them, should be and they are hereby permanently and perpetually barred, restrained and enjoined from using the mark and name Savoil upon their motor additive products in the State of Missouri, Texas and Oklahoma.

It is Further Ordered, Adjudged And Decreed that the Plaintiff shall have and recover judgment of and from the Defendants in the sum of $1,485.00, which has heretofore been decreed to be due Plaintiff as damages and costs by reason of the violation by Defendants of the preliminary injunction herein.

It Is Further The Order Of This Court that all costs are taxed against the Defendants, but that Plaintiff's claim for attorney fees should be and the same is hereby denied.

It Is Further The Order Of This Court that the $50,-000,00 bond or undertaking in the sum of $50,000.00 heretofore posted by the Plaintiff as a condition precedent to the granting of the preliminary injunction herein be dissolved and the Court Clerk of the United States District Court for the Northern District of Oklahoma, Noble Hood, is hereby ordered and directed to return to Frank Sweetin and Nadyne Sweetin, also known as Mr. and Mrs. Frank Sweetin, the passbook to Savings Account #18165 of the Farmers & Merchants State Bank, Tulsa, Oklahoma, and the Court further declares that the assignment of said passbook to the said $50,000.00 Savings Account is hereby set aside, discharged and held for naught.

ALLEN E. BARROW, Judge of the United States District Court for the Northern District of Oklahoma

Filed June 5, 1964.

APPENDIX I (b)

APPEAL AND CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA.

Robert O. Beresford and Robert Baronsky (Floyd L. Rheam on briefs) for appellants and cross-appellees.
James R. Head and Lawrence A. G. Johnson (Farmer, Woolsey, Flippo & Bailey, of counsel, on briefs) for appellee and cross-appellant.

Before PHILLIPS, LEWIS and HILL, Circuit Judges.
PHILLIPS, Circuit Judge.

Atomic Oil Company of Oklahoma, Inc., brought this action against Bardahl Oil Company, Bardahl Manufacturing Corporation, corporations, and Dale McKeown, Franchised Distributor, d/b/a Bardahl East Oklahoma, for alleged infringement of two registered trade-marks, seeking injunctive relief and damages.

In 1957, Atomic began marketing and selling an oil viscosity additive and a gasoline additive for automotive engines under the trade-mark "Atomic." Because of a possible conflict with a prior existing trade-mark, Atomic ceased using that mark and in June, 1958, commenced the interstate use of the trade-mark "Savmotor."

On September 23, 1958, Atomic filed its application in the United States Patent Office for the registration of the trade-mark" Savmotor." In the photostat of the trade-mark in the file wrapper of the Patent Office application, the trade-mark appears in black and white. The mark is for an oil concentrate or oil additive. On the can in which the concentrate or additive is sold commercially, the mark has a red background. At the

upper portion of the mark there is an atomic bomb burst design in white in the shape of a mushroom. On this white burst, in large black letters, appears "Savmotor." Below the burst appear the words, in black, "Oil Concontrate." Below that, in rather large white letters, appear the words "Motor Protection." Following that, appear the words "Product of Atomic Oil Company of Oklahoma, Tulsa, Oklahoma," and at the base of the mark, on a black background, appear the words, in white, "Cars • Trucks • Tractors • Dielsels." The mark was registered on January 12, 1960, as No. 691,152 under the Lanham Trademark Act of 1946. The atomic bomb burst design does not appear on that trade-mark. However, on December 24, 1958, Atomic filed an application for an additional trade-mark. It is substantially the same as the earlier trade-mark, except it contains in black and white the bomb burst design, with the words "Savmotor" and "Motor Oil Additive" imposed thereon in white letters. On March 15, 1960, the last-mentioned mark was granted Atomic as an additional trade-mark, No. 694,445. In the registered marks, instead of "Oil Concentrate" the words used are "Oil Additive."

In 1962, the Bardahl Companies began selling, in a green can, a product of the same basic material as the Atomic product. At the top of the design of the Bardahl product, imposed on the green background, are the words, in white, "Scientifically Formulated Oil Stabilizer." Below that appears a white shield, and on that shield appear in red the letters "SAV," then a representation of a drop of oil, followed by the letters "IL." Below the shield, on a green background, appear the words, "Reduces Oil Consumption of Engines" and the words "Cars, Tractors, Trucks, Diesels." On the other side of the can, on the green background appear the letters "Sav," the representation of a drop of oil, and the letters "IL" and below that directions for use and a statement of the characteristics and

functions of the Bardahl product. Among other things claimed is that it "reduces oil burning in high-mileage cars – stops embarrassing exhaust smoke, controls piston blow-by and plug fouling – while providing proper lubrication and reducing engine wear." On the side of the can, in fairly large white letters on the green background, appear the words "Barahl Oil Company, St. Louis 20, Mo. Authorized Blender for Bardahl Manufacturing Corporation, Seattle 7, Washington."

The trial court found that the Atomic marks were descriptive words and devices and not entitled to registration under the Lanham Trademark Act of 1946; and it further found that the Atomic marks had acquired a secondary meaning in Missouri, Oklahoma, and Texas, and that there was a likelihood of confusion between the two marks.

The trial court granted an injunction against the Bardahl Companies, restraining them from selling their product with the mark "SAVOIL" thereon in the States of Missouri, Texas and Oklahoma. It awarded Atomic $1,485 for contempt of court for violation of the preliminary injunction which it had granted, but denied an accounting for profits or damages, on the ground that there had been no showing of fraud or intent to palm off the Bardahl product as the product of Atomic. From that judgment, both plaintiffs and defendants below have appealed.

Atomic claims that the injunction should have embraced all of the states in which it was doing business, and that it should have been awarded damages. The Bardahl Companies contend that Atomic's marks were merely descriptive and that there was no proof of a secondary meaning, even in the States of Missouri, Oklahoma and Texas.

A mark, which, when applied to the goods of the person claiming the mark, is merely descriptive of the characteristics or qualities or of the use of functions of the goods cannot be registered. [1]

The word "save" means to protect – to preserve or guard from injury. Webster's New International Dictionary, 2d Ed. Unabridged, p. 2223. The word, here, clearly means to save the motor or protect the motor or automotive engines by improving the quality of the motor oil. Of course, as applied to the products here involved, "motor" means an automotive engine. It seems perfectly clear to us that the word "Savmotor" is descriptive of the qualities and the functions of the products and was not entitled to registration under the Lanham Act.

To acquire a secondary meaning, descriptive words must "have been used so long and so exclusively by one producer with reference to his" goods or articles "that, in that trade and to that branch of the purchasing public, the word or phrase has come to mean that the article" is "his product." [2]

[1] In re W. A. Sheaffer Pen Co., C.C.P.A., 158 F.2d 390, 391;
Application of Hercules Fasteners, C.C.P.A., 203 F.2d 753, 757;
Hygienic Products Co. v. Huntington Laboratories, C.C.P.A., 139 F.2d 508, 510.

[2] G. & C. Merriam Co. v. Saalfield, 6 Cir., 198 F. 369, 373;
Armco Steel Corporation v. Watson, D.C.D.C., 188 F. Supp. 554, 556;
Hygrade Food Products Corp. v. H. D. Lee Mercantile Co., 46 F.2d 771, 772;
Curtis-Stephens-Embry Co. v. Pro-Tek-Toe Skate Stop Co., 8 Cir., 199 F.2d 407, 411;
Speaker v. Shaler Co., 7 Cir., 87 F.2d 985, 987, c.d. 301 U.S. 695.

In Spang v. Watson, U.S. App. D.C., 205 F.2d 703, c.d. 346 U.S. 938, the court said: "• • • the application of this doctrine of secondary meaning requires that not merely 'a subordinate meaning' but 'the primary significance of the term in the minds of the consuming public • • • is not the product but the producer.'" [3]

In Blisscraft of Hollywood v. United Plastics Co., 2 Cir., 294 F.2d 694, 697, the court said:

> "To establish a secondary meaning for an article it must be shown that the design is a mark of distinction identifying the source of the article and that purchasers are moved to buy it because of its source."

We have carefully examined the evidence and find no proof, whatever, that Atomic's mark had come to identify in the minds of the purchasers thereof Atomic as the manufacturer or producer of the products to which Atomic's marks were affixed. There was evidence that some purchasers were confused between the "Savmotor" products and the "Savoil" products, but there was no evidence, whatever, that such purchasers identified such products as those produced or manufactured by Atomic.

Confusion between products is one thing and confusion between the producer of a product and some other producer is

[3] See also: Schulmerich Electronics v. J. C. Deagan, Inc., C.C.P.A., 202 F.2d 772, 777;
Kellogg Co. v. Nat. Biscuit Co., 305 U.S. 111, 118, 119;
Food Fair Stores, Inc. v. Lakeland Grocery Corp., 4 Cir., 301 F.2d 156, 161, c.d. 371 U.S. 817;
G. Leblanc Corporation v. H. & A. Selmer, Inc., 7 Cir., 310 F.2d 449, 457, c.d. 373 U.S. 910.

another. The questionnaire test made by Dr. William H. Day, a witness for Atomic, was inconclusive, and illustrates the distinction we have made. It gained information only with respect to the product and not with respect to the producer or maker thereof. Day made photographs of the containers of a number of products, which appear in the record as a plaintiff's exhibit. The names of the manufacturers clearly appeared in the photographs of the containers of Du Pont, Champion, Casite and Bardahl products. But in the photograph of the "Savmotor" mark, the words "Product of Atomic Oil Company of Oklahoma" were marked out and did not appear, and in the photograph of "Savoil" the words "Bardahl Oil Company" were wholly omitted. Day testified that he questioned a number of purchasers of oil additives in Tulsa and Oklahoma City and that 69 per cent of the responses identified the "Savmotor" and "Savoil" products as made by the same company: But none of them identified Atomic as the maker or producer of the "Savmotor" product and none indicated any knowledge on their part as to who was the maker or producer thereof. In our opinion, the facts ascertained by the questionnaire had no probative value on the issue of secondary meaning.

We conclude that Atomic's marks were merely descriptive; that the proof did not establish they had acquired a secondary meaning in Missouri, Oklahoma, Texas, or elsewhere; and that the finding of the trial court that the marks had acquired a secondary meaning in such states was clearly erroneous.

Reversed and remanded, with instructions to enter judgment for the defendants below.

APPENDIX II

1.	Anacin	A.	Beecham Products
2.	Emperin	B.	Lewis Howe Co.
3.	Dristan	C.	Whitehall Laboratories
4.	Maalox	D.	Burroughs Welcome & Co.
5.	Listerine	E.	Whitehall Laboratories
6.	Alka-Seltzer	F.	Paxton Products
7.	Kleenex	G.	William H. Rorer, Inc.
8.	Mexsana	H.	Bardahl Mfg. Co.
9.	Dial	I.	Walter Lambert Pharmaceutical Co.
10.	Ajax	J.	Atomic Oil Company
11.	Kotex	K.	Carter Products Inc.
12.	Rise	L.	Kimberly Clark Corporation
13.	Savmotor	M.	Miles Laboratories
14.	Savoil	N.	Kimberly Clark Corporation
15.	STP	O.	Plough Inc.
16.	Tums	P.	Colgate Palmolive
17.	Macleans	Q.	Armour & Co.

APPENDIX III

Answers

1-C or E	5-I	9-Q	13-J	17-A
2-D	6-M	10-P	14-H	
3-E or C	7-N or L	11-L or N	15-F	
4-G	8-O	12-K	16-B	